IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 51 OF 2006

Shri Domnic Savio Nazareth
R/o H. No. 1453, Orda
Candolim, Bardez, Goa. ... Applicant

versus

State of Goa
Through Public Prosecutor
Government of Goa
Panaji, Goa. ... Respondent

Mr. Joseph Vaz, Advocate for the Applicant/Accused.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent/Complainant.

CORAM : N. A. BRITTO, J.

DATE : 20TH NOVEMBER, 2007.

JUDGMENT

This revision is directed against Judgment dated 25-9-2006 of the learned Adhoc Sessions Judge, Panaji, upholding the conviction of the accused under section 406 I.P.C. and reducing the sentence imposed by the learned J.M.F.C., Panaji, to six months S.I. and a fine of Rs.5000/- and in default of payment of fine to undergo S.I. for one month. The accused has been acquitted under section 420 I.P.C.

2. International Travel Bureau(I.T.B.) is a proprietorship concern of

Otto Oliveira Fernandes/PW6 and it had a Head Office at Luis de Menezes Street at Panaji where Shephan Shaikh/PW3 was working from 1-6-1995 as Office Executive. It had a counter or a Branch Office at Cidade de Goa Beach Resort at Dona Paula. They were the travel agents and transporters of Cidade de Goa Beach Resort and had a full fledged office looking after the entire ticketing and taxi business of the said Resort. The accused was employed as a Manager trainee in mid October, 1998 at a salary of Rs.2000/- to look after the Travel and Ticketing Office at Cidade de Goa during the tenure of Manager Shri Ivan Rodrigues and the accused took over as Manager from 1-1-1999 at a salary of Rs.2500/-. Tanuja Khanolkar/PW5 joined under the accused as the Ticketing Assistant from 11-1-1999 and she was required to report to the accused directly as he was the Manager.

3. The accused as a Manager was required to look after the accounts, cheque as well cash transactions and was required to report on fortnightly basis by sending a ticket summary. The transactions from 1st to 15th of the month were required to be reported between 18th to 25th of the month and of the second fortnight from 16th to 30th or 31st were required to be reported between 8th and 10th of the following month.

4. After the accused took over charge as Manager it was noticed somewhere in August' 1999 by the Head Office that there used to be shortage of funds which came in the way of making payments to the Airlines and therefore the said Shephan Shaikh/PW3 called the accused to the Head Office and it was stated by him that he was not aware of most of the

transactions and therefore the said Tanuja/PW5 was called from 1-9-1999 to 4-9-1999 and then it transpired that most of the amount was misappropriated by the accused by showing the cash transactions as entries of credit cards. Ultimately, a complaint dated 7-10-1999-Exh.PW6/A came to be filed against the accused by Otto Oliveira Fernandes/PW6. When both parties were called for inquiry they tried to settle the same and the accused executed a pronote dated 12-10-1999 for Rs.3.85 lakhs but on the next date, the accused alleged that it was taken under duress. Otto Oliveira Fernandes/PW6 activated his earlier complaint by another complaint dated 5-11-1999-Exh.PW6/C.

5. The case was investigated by PSI Raposo/PW22 and a charge-sheet filed. Shephan Shaikh/PW3 also prepared a statement which was produced as Exh.PW3/A showing the amount misappropriated by the accused.

6. The accused was initially charged for misappropriating an amount of Rs.3,74.159/- and thereafter the charge was amended so as to include Rs.3,85,000/- as per the said statement. In support of the charge, against the accused, prosecution examined as many as 27 witnesses out of which Pundalik Gawas/PW7, Daniel/PW8, John Nunes/PW9, Socoro Lopes/PW25 were the drivers, out of 48 employed at the said Resort. Francis Pereira/PW26 could also be included in the same category. Dinesh/PW13, Michael Fernandes/PW16 and Stevan/PW18 were the employees/travel assistants who were working under the accused at Cidade de Goa counter. Shri Ashok Mashelkar/PW15 is a Notary before whom the

accused executed the pronote-Exh.PW6/B and gave it to the Complainant Otto Oliveira Fernandes/PW6 with a view to settle the matter. Sanjay Naik/PW14, Girish Karapurkar/PW24 and Mario Fernandes/PW27 were also examined on behalf of Cidade de Goa Beach Resort. Otto Oliveira Fernandes/PW6, Shephan Shaikh/PW3 and Tanuja/PW5 were the most important witnesses of the prosecution.

7. The learned trial Court after assessing the evidence and referring to various invoices produced by the prosecution came to the conclusion that the accused had misappropriated the amount. In appeal, the Appellate Court found that non examination of the Chartered Accountant Shri R. K. Pikale in support of the Certificate dated 31-3-2000-Exh.PW6/A was not fatal. The learned Appellate Court found that tape recorded speeches were documents as defined under section 3 of the Act and were admissible in evidence. The learned Appellate Court also relied on the opinion given by the Government Examiner of Questioned documents dated 26-9-2000-Exh.PW21/A for the purpose of convicting the accused.

8. The learned Appellate Court observed that Dattaraj Naik/PW1 had identified the documents which were marked as PW1/A and PW1/B and his signatures were there on all the exhibits and his evidence was not shaken. The discrepancies in his evidence were trivial in nature. The learned Appellate Court observed, and in my view rightly, that though the seized documents were not sealed, they were all signed by the attaching witnesses and it was not the case of the accused that the said documents were

manipulated or fabricated. The learned Appellate Court observed that the accused had cross-examined Shephan Shaikh/PW3 and there was impress of truth in her evidence and her evidence was supported by documentary evidence and the discrepancies which had cropped in were of minor nature and nowhere demolished the case of the prosecution and it was fully corroborated by Tanuja/PW5 who was equally an important witness. The learned Appellate Court observed that both the aforesaid witnesses had given details regarding different invoices which were the subject matter of misappropriation and their evidence disclosed that Tanuja/PW5 was working under the accused. The learned Appellate Court also observed that Tanuja/PW5 and Otto Oliveira Fernandes/PW6 were reliable and credible and that they had brought on record the sequence of the entire episode of misappropriation done by the accused right from the beginning of joining as Manager of the Office. The learned Appellate Court also noted that the evidence of Shephan Shaikh/PW3, Tanuja/PW5 and Otto Oliveira Fernandes/PW6 as regards drivers not having been paid, was fully supported by Pundalik Gawas/PW7, Daniel/PW8 and John Nunes/PW9 and their evidence also disclosed that the accused and his father had approached them and requested time to pay the dues of the taxi drivers. The learned Appellate Court also observed that the evidence of Otto Oliveira Fernandes/PW6 of having sent an amount of Rs.50,000/- through Michael Fernandes/PW16 was fully in accordance with Shephan Shaikh/PW3, Tanuja/PW5 and Otto Oliveira Fernandes/PW6 as well as Michael Fernandes/PW16. The learned Appellate Court also referred to the evidence of Dinesh/PW13 and observed that his evidence had lent full support to the

case of Otto Oliveira Fernandes/PW6 regarding the payment to the taxi drivers in the sum of Rs.50,000/- plus Rs.5000/-. He also noted that Sanjay Naik/PW14 in his evidence had disclosed about the misappropriation of Rs.11958/-/-. He also noted that the evidence of Ashok Mashelkar/PW15 demonstrated unerringly that the pronote was prepared by him in the Office after taking details from the Complainant and the accused and that he had denied the suggestion that the pronote was executed under threat from the Complainant. The learned Appellate Court after discussing the other evidence on record came to the conclusion that the accused did misappropriate the amount belonging to Otto Oliveira Fernandes/PW6.

9. Admittedly, this is a revision filed by the accused against concurrent findings of fact convicting the accused under section 406 I.P.C. As stated by the Apex Court in **State of Maharashtra** v. **Jagmohan Singh Kuldip Singh Anand and others**((2004) 7 SCC 659) revisional jurisdiction cannot be exercised as a second appellate power and it is impermissible for the High Court to embark upon an in-debt re-examination of the oral and medical evidence and come to the conclusion, contrary to the consistent one reached by the two Courts below. There is no doubt that revisional jurisdiction can be exercised in order to prevent a gross and culpable failure of justice. Revisional jurisdiction cannot be converted into appellate jurisdiction since that would be bringing in conflict one provision of the Criminal Procedure Code with another. Revisional Court will entertain a revision on facts where either there is no evidence to support the finding or where finding arrived at is perverse or such as no reasonable man would have arrived at on the

evidence produced.

10. The case of the prosecution can stand on its own even if the certificate of the Chartered Accountant-Exh.PW21/A is excluded for non examination of Shri Pikale; the evidence of audio cassette, the same not being in tune with the provisions of para VI, Rule 24 of the Criminal Manual; and, the opinion of the handwriting expert-Exh.PW21/A for want of examination of the said handwriting expert in support thereof.

11. The learned Counsel on behalf of the accused contends that the accused was not the Manager of ITB Branch Office at Cidade de Goa but was merely a supervisor, who has been falsely implicated in this case only after the accused gave his resignation dated 30-8-1999 and joined the Travel Corporation of India from 1-10-1999 who were the competitors of the International Travel Bureau.

12. The above submission is against the entire volume of evidence produced by the prosecution and therefore needs to be rejected. The learned trial Court noted that the accused even if he was holding the post of a supervisor, he carried higher responsibility than the other staff as he was entrusted with all the cash arising from the transactions at Cidade de Goa counter, as stated by Otto Oliveira Fernandes/PW6. It is true that the accused who joined Otto Oliveira Fernandes/PW6's International Travel Bureau in mid October, 1998 as a trainee Manager and became its full fledged Manager w.e.f. 1-1-1999 was not issued with an appointment letter like the other

employees employed by him but on that count alone it could not be said that the accused was not the Manager of I.T.B's the branch/counter at Cidade de Goa. That the accused was employed as a Manager is a fact which is deposed to by several witnesses which include Gawas/PW7, Daniel/PW8, John Nunes/PW9, Lopes/PW25 who were the drivers as well as Dinesh/PW13, Michael/PW16 and Stevan/PW18 who were the employees as well as by Sanjay/PW14, Girish/PW24 and Mario/PW27 who were examined on behalf of the Cidade de Goa Beach Resort. Moreover, the visiting card-Exh.13/A produced by the said Dinesh/PW13 shows that the accused was working as a Manager. The evidence of Dinesh/PW13, Michael Fernandes/PW16 and Stevan/PW18 clearly shows that at the end of the day whatever money was collected was handed over to the accused who was the Manager. They also stated that sometimes it is they who collected the cash from Cidade de Goa and sometimes it is the accused who collected the same and the same had to be accounted to Shephan Shaikh/PW3 who was the Office Executive of the said International Travel Bureau and this was being done by way of submitting fortnightly ticket summaries. As far as the other plea of the accused of false implication because he had resigned is concerned, the learned Appellate Court noted, and in my view rightly, that the said plea of the accused was not in consonance with his cross-examination of the witnesses of the prosecution and that the accused had failed to place on record either a copy of the call letter received by him from the Travel Corporation of India or a copy of the resignation submitted by him to Otto Oliveira Fernandes/PW6 inasmuch as such a plea was not even put forward to the said Otto Oliveira Fernandes/PW6. Such a plea is also conspicuously

absent in the letter dated 13-10-1999-Exh.PW22/A addressed by the accused to the D.G.P. In the circumstances, therefore, the contention that the accused was falsely prosecuted for joining the competitor of International Travel Bureau cannot be accepted.

13. The learned Counsel on behalf of the accused further contends that no proper books of accounts like cash book have been produced by the prosecution and what has been produced are loose sheets of papers and on the basis of the same the accused could not be convicted, and in support of the said submission, learned Counsel on behalf of the accused has placed reliance on the case of **Dadarao** v. **The State of Maharashtra**((1974) 3 SCC 630) wherein the Apex Court observed that mere production of entry in books was not conclusive evidence of entrustment of the money to the accused. The learned Counsel on behalf of the accused also placed reliance on **Velji R. Patel** v. **The State of Maharashtra**(AIR 1965 SC 1433) wherein the Apex Court held that before a person can be said to have committed criminal breach of trust within the meaning of Section 405 I.P.C. it must be established that he was either entrusted with dominion over property which he has been said to have converted to his own use. In order to establish “entrustment of dominion” over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. In my view, the submission of the learned Counsel on behalf of the accused cannot be accepted at all. The prosecution has produced, amongst others invoice books and ticket sales summaries. If the money received by the accused was to be

accounted by the said ticket sale summaries, sent fortnightly, they were bound to be in loose form. It is not the case of the accused that a cash book was otherwise maintained but was not produced.

14. The learned Appellate Court has come to the conclusion that the evidence of Shephan Shaikh/PW3, Tanuja/PW5 and Otto Oliveira Fernandes/PW6 is corroborative, reliable and credible notwithstanding the inter se discrepancies in their evidence which were not at all material and in my view, the said conclusion could not be faulted.

15. After it was found that there was shortage of funds in the account to make payment to the Airlines, after the accused had taken over as the Manager, the matter was inquired into by Shephan Shaikh/PW3 with the assistance of Tanuja/PW5 in the presence of the accused and the said Otto Oliveira Fernandes/PW6 and later a statement i.e. Exh.PW3/A was prepared.

16. Some of the instances of misappropriation could be looked into. The first item on the said statement shows the amount of Rs.4475/- misappropriated by the accused which pertains to invoice No.678 dated 7-1-1999. Admittedly this invoice No.678-Exh.PW3/B was a cash transaction, the cash having been received by the accused himself on 7-1-1999 at a time when Tanuja/PW5 had not joined the Office and therefore the accused could not have blamed her for misappropriating the said amount. The said amount received in cash by the accused was not handed over by the accused to Shephan Shaikh/PW3 as was required of him. The same

would have been handed over if it was reflected in the ticket sale summary for the period from 1-1-1999 to 15-1-1999-Exh.PW1/A colly. This has been stated by Shephan Shaikh/PW3 when she identified the signature of the accused on Exh.PW3/B for having received the cash of Rs.4475/- but not accounting it in the ticket sale summary-Exh.PW1/A for the said fortnight. She categorically stated that the accused misappropriated the said amount of Rs.4475/- and her said statement could not be faulted. Likewise Tanuja/PW5 stated that the said invoice No.678-Exh.PW3/B was not prepared by her. Obviously it could not be prepared by her because she joined the branch office only from 11-1-1999. She stated that the ticket sale summary for the first fortnight was prepared by her and the said invoice No.678 was not included in the said first fortnightly ticket summary. She categorically stated that the accused had informed her that she should not write the said invoice No.678 in the said summary because she had not joined the office on 7-1-1999 and that the accused had also told her that the accused would clear the amount received on the said invoice with the Head Office. The accused having received the said amount in cash and having failed to account for the same in the first fortnightly summary is presumed to have misappropriated the same. As stated by the Apex Court in **State of H. P.** v. **Karanvir**(2006 Cri. L. J. 2917) "the actual manner of misappropriation, it is well settled, is not required to be proved by the prosecution. Once entrustment is proved, it is for the accused to prove as to how the property entrusted to him was dealt with in view of Section 405 I.P.C. If the respondent/accused fails to produce any material for this purpose, the prosecution should not suffer therefrom".

17. The next item which could be looked at is item no.4 of the said statement-Exh.PW3/A and which is regarding a sum of Rs.8842/- vide invoice No.745-Exh.PW1/B colly. As per Tanuja/PW5 this amount of Rs.8842/- was received by the accused from Cidade de Goa and was shown by the accused on bill to register-Exh.PW1/A. She has identified the handwriting of the accused on the said register at point 'Y'. The same is reflected in the ticket sale summary-Exh.PW1/A against the name of Mr. K. Mashini. Shephan Shaikh/PW3 has also stated that for the fortnightly statement for 16-2-1989 the accused received the amount in cash of invoice No.745 dated 28-2-1999 of Rs.8842/- but the said amount was not received from the accused by the International Travel Bureau till date and therefore the accused misappropriated the same. The evidence of Mario Fernandes/PW27 who is the Assistant Finance Controller at Cidade de Goa shows that there was nothing payable to the International Travel Bureau from January, 1999 to September, 1999 and therefore it is obvious that although the accused had received the said amount in cash, had made a wrong entry in the said register and the said summary.

18. The next item which could be looked at is item No.14 of the said statement-Exh.PW3/A relating to invoice No.947 dated 31-7-1999 for Rs.8190/- which was prepared by Tanuja/PW5 and which is shown by the accused as bill to room transaction. As per Tanuja/PW5 this invoice No.947 for a total of Rs.8190/- was prepared by her but the amount was received by the accused and was shown in bill to register at Exh.PW1/C. The evidence of Shephan Shaikh/PW3 confirms her statement. She has stated that this

invoice No.947-Exh.PW3/J for Rs.8190/- was prepared by Tanuja/PW5 and was shown in bill to room and mentioned in ticket sale summary as per her the original of Exh.PW3/J was issued to the guest and since the ITB has not received the said amount, the accused has misappropriated the same. As already stated as there was nothing due from Cidade de Goa to be received by ITB and since the accused received the said amount from the guest mentioned on the said receipt and having failed to account for the same the obvious conclusion would be that the accused misappropriated the said sum.

19. Next is item No.12(4) of Exh.PW3/A. Girish Karapurkar/PW24 has stated that he had purchased tickets for Mr. and Mrs. Sandeep Sardessai and paid Rs.9684/- to the accused and when the Complainant had asked him about the same, he had confirmed that it was a cash transaction. This pertains to invoice No.916 dated 23-6-1999 for which receipt No.689 was issued by the accused and this has been stated by Tanuja/PW5. As per her the ticket summary for that fortnight was written by the accused on which the accused had shown it to be a credit card sale. She has identified the handwritings of the accused on the invoice and receipt. Obviously this cash amount of Rs.9684/- has not been accounted for by the accused and hence misappropriated.

20. Then item No.16 of Exh. PW3/A is regarding misappropriation of Rs.11958/- and pertains to invoice No.965 dated 24-8-1999. As per Tanuja/PW5 the said invoice was prepared by her and so also the sale summary but the accused showed it as credit sale on Exh.PW3/A which was

prepared by the accused. Sanjay Naik/PW14 has confirmed that the amount of Rs.11958/- of tickets purchased by one Kalavardha, who was their guest, was debited to his account and the payment in cash was made to the accused and when Otto Oliveira Fernandes/PW6 asked him as to why this bill was pending for long, he told him that the amount was paid to the accused and he also phoned the accused about the same and the accused came to his office and admitted having received Rs.11958/- and requested him to save him and he would find out a solution to the same. There is also voluminous evidence which shows that the drivers went on strike between 11-9-1999 to 20-9-1999 for non payment of their dues by the accused as a result of which Otto Oliveira Fernandes/PW6 gave a loan of Rs.20,000/- to the accused and cleared their dues by paying the drivers through Michael/PW16 an amount of over Rs.55,000/-. This is evident from the evidence of the drivers and other employees of the branch office at Cidade de Goa Resort.

21. It is not necessary for this Court to go into the other details of misappropriation. The evidence of the prosecution has been considered at length by the learned Appellate Court before upholding the conviction against the accused under section 406 I.P.C. There is also evidence of conduct of the accused and of admission, produced by the prosecution which, inter alia, shows that the accused had first approached Shivanand/PW4 for a cheque of Rs.40,000/- in the name of International Travel Bureau because the accused wanted to make some adjustment of money due to them and the accused wanted the cheque to be issued in the name of ITB drawn on Panaji Branch

of his account. Thereafter the accused handed over his passport as security and proceeded to Mumbai and on return handed over a cheque to the said Otto Oliveira Fernandes/PW6 by forging the signature of his wife which has been confirmed by Shirodkar/PW12 and ultimately the accused admitted his liability by executing a pronote in favour of the said Complainant Otto Oliveira Fernandes/PW6 in the sum of Rs.3,85,000/- on 12-10-1999 i.e. before the complaint dated 7-10-1999 filed by the said Complainant was registered against the accused and which was registered only subsequently on 16-11-1999 after the accused went back on the said pronote alleging that it was got executed by force. In fact the evidence of the Notary Shri Mashelkar/PW15 shows that it was voluntarily executed by the accused, and no Police Constable was present at that time, admitting his liability to the Complainant in the sum of Rs.3,85,000/- and there was no element of force involved at all.

22. Considering the evidence led by the prosecution which has been rightly assessed by the learned Appellate Court, in my view, the conviction and sentence imposed against the accused could not be faulted.

23. I find there is no merit in this revision and consequently the same is hereby dismissed. Bail bonds, if any, shall stand cancelled.

N. A. BRITTO, J.

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